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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

SYED KHALED HUSSAIN, Plaintiff and Appellant, v. PERALTA COMMUNITY COLLEGE DISTRICT et al., Defendants and Respondents.	A164189, 164827 (Alameda County Super. Ct. No. RG20057885)

Plaintiff Syed Hussain, formerly an employee of defendant Peralta Community College District (the district), sued the district and two of its employees asserting retaliation, whistleblower, and breach of contract claims. Defendants successfully moved for summary judgment, and judgment was entered in their favor. The trial court also ordered Hussain to pay $6,974.29 in costs apportioned to his breach of contract claim.

In this consolidated appeal, Hussain argues that the trial court (1) erred in granting summary judgment, as he presented triable issues of material fact as to each of his three claims; and (2) abused its discretion in awarding costs to defendants. We conclude that the costs order should be modified to award $6,812.59 to defendants, but otherwise affirm.

FACTUAL BACKGROUND[1]

A. *April 2018 Employment Contract*

Hussain was hired by the district in April 2019 as Dean of Liberal Arts and Social Sciences for Merritt College in Oakland. The employment contract provided that Hussain was an "at will" employee and that his term of administrative assignment "shall commence on April 3, 2018, and continue through June 30, 2020, or unless terminated as hereby provided." It stated that the district "may terminate" the contract "at any time with or without cause, in the sole discretion of the district, upon 90 days written notice before the termination date" and that Hussain "shall have no right to a hearing, a grievance, or other administrative review to challenge the termination of administrative assignment."

B. *August 2018 Incident Between Hussain and Morales*

David Morales was a part-time adjunct instructor in the music department at Merritt College who, prior to Hussain's employment, had been asked to strategize about class enrollment for the college. On August 24, 2018, Morales came into Hussain's office and asked why Hussain had canceled a certain music class. Hussain responded by asking why he needed to explain his enrollment management decisions to Morales. Morales then told Hussain that he " 'will not be here very long.' " When Hussain asked Morales twice if that was a threat, Morales repeated his statement both times.

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[1] All of the facts set forth herein are undisputed unless otherwise noted. Only facts necessary to the resolution of the appeal are recited and additional facts are set forth within the discussion portion of this opinion.

That same day, Hussain sent an email to Merritt College President Marie-Elaine Burns and Interim Vice Chancellor of Human Resources Chanelle Whittaker relaying the incident. Hussain stated that he would be speaking with his attorney about getting a restraining order against Morales, and that "[i]f the district's attorneys could help me with that I would be very grateful."

C. *September and October 2018 Complaints Against Hussain*

On September 21, 2018, Morales sent an email to President Burns stating that he had passed Hussain on campus and Hussain "was most certainly angry," and when Morales suggested they "get together and work through the tension," Hussain responded: " 'Not interested.' " Morales stated that Hussain had added a music class and hired a teacher without conferring with the department chair, and linked a newspaper article about Hussain related to his prior position at a different college.

On October 4, 2018, Morales emailed President Burns and indicated that Hussain had incorrectly told other faculty he had taken a restraining order against Morales. The email continued: "The bigger problem is the tremendous frustration being voiced all over with chairs in his division. And I'm not a player in that. It's their story due to the lack of consultation and respect around many things." Morales sent a follow-up email shortly thereafter stating that "[o]thers who work with him directly don't see anything changing with his demeanor and demands on them, even now."

That same day, Morales emailed Peralta Federation of Teachers (PFT) President Jennifer Shanoski stating that he'd had "enough" of Hussain, as Hussain had told a faculty member that he had a

restraining order against Morales and had made "slanderous comments" about Morales to English department faculty. On October 5, 2018, Shanoski responded that she "agree[d] with" Morales, and that she and fellow union representative Sheila Metcalf-Tobin had met with President Burns and "outlined various concerns (including public shaming and ridicule)."

On October 16, 2018, music department chair Monica Ambalal sent an email to President Burns stating that Hussain had hired an instructor without her recommendation, sent requests to faculty to teach various courses without informing her, and refused to hire an applicant who she had recommended. It stated: "I don't know how to be heard and respected as a department chair by my dean. My union contract says that I am the 'expert' in the field yet that is being ignored completely." Ambalal also stated that she was being "called into question by [Hussain] for letting him know which class to observe for my [tenure candidacy review] when the committee decides that, not me. I just don't know what to do."

D. *October 2018 Discrimination Complaint Against Morales*

Hussain filed a formal discrimination complaint with the district against Morales on October 19, 2018. It alleged that Morales was "engaging in ongoing acts of discrimination and harassment against me – creating a hostile work environment. These include, but are not limited to, threats, intimidation, retaliation, harassment, slander, libel, falsification of data in order to discredit me, and stereotyping me as an angry Muslim man. I fear for my safety and wellbeing." It alleged that Morales had presented "falsified enrollment data" to President Burns for cancelling certain courses. Hussain requested Morales's

termination, as well as assistance with obtaining a restraining order against Morales.

E. ***October 2018 Performance Evaluation***

President Burns conducted Hussain's six-month performance evaluation on October 25, 2018, and told Hussain that she had received complaints from faculty about him. On November 2, 2018, President Burns emailed Hussain a written summary of the evaluation. It stated: "There is one item where improvement is needed and that is in his way of responding/reacting to real and perceived criticism." The summary further stated that "it feels to some that he is compelling faculty and staff to accept 'his way' – his class/course, new faculty hires, course marketing, and enrollment management recommendations," and that President Burns had "held meetings with Dr. Hussain about his responses" and "discussed with him how he could better handle himself in these situations. For example, adjust his tone and demeanor, allow for timely consultation with faculty/department chairs, and give some explanation as to why his decision may not align with theirs during the consultative process."

F. ***Additional Fall 2018 Complaints Against Hussain***

President Burns received complaints about Hussain during the fall of 2018. Between October 2018 and January 2019, approximately six or seven faculty members told Hussain directly that they did not appreciate his tone or demeanor at work. Metcalf-Tobin (also co-chair of the arts department) felt Hussain had hired someone without adequately informing her or providing her an opportunity for evaluation. English department co-chair Chriss Foster also had complaints about Hussain related to hiring and schedules.

G. *December 2018 Discrimination Complaint Against Whittaker*

On December 21, 2018, Hussain filed a formal discrimination complaint against Whittaker. It alleged that Whittaker was "retaliating against me for reporting her dereliction of duty" to the district, "aiding and abetting Mr. David Morales's discriminatory and harassing actions against me," and "demanding that I hire individuals who have defrauded the district and behaved unprofessionally." It specifically alleged that Whittaker had "exerted pressure" to hire Morales, and had "misled" President Burns about the hiring eligibility of two other teachers who had "received unsatisfactory evaluation and reviews." The complaint requested Whittaker's removal from her position, as well as the reversal of her hiring "orders."

H. *January 2019 Request to Terminate Hussain*

On January 22, 2019, President Burns had a meeting with Hussain and brought up complaints made about him. That same day, President Burns sent an email to Whittaker requesting that Hussain be placed on an immediate leave of absence and that his contract be terminated as of June 30, 2019. The request stated that President Burns had received complaints about Hussain from faculty, staff, PFT members, and Human Resources "beginning in August and the entire Fall 2018 academic semester." For example, "[t]he division staff assistant left work one day in August in tears and was put on stress leave by here [sic] doctor for several weeks – she was afraid to return to work for fear that the Dean's behavior would continue." A student employee claimed she was fired by Hussain for "trumped up reasons," and another student employee quit after witnessing that interaction. Female faculty were "feeling that there is sexism involved as they are

questioned about their recommendations, remarks, concerns and questions when their male counterparts are not." President Burns stated that she had spoken with Hussain several times, but "the concerns and complaints keep coming."

Pursuant to district policy, any request for the termination of a dean to must be made by the college president. The district's Board of Trustees (the board) is the decision-maker on such requests. On February 4, 2019, district Chancellor Jowel Laguerre emailed Whittaker about the agenda for the February and March board meetings, including Hussain's "non-extension." On February 5, 2019, Whittaker responded that "the request from President Burns is for the immediate termination of the employment of Dean Hussain."

I. ***February and March 2019 Complaints Against Hussain***

On February 27, 2019, Merritt College communication department co-chair Hilary Altman sent an email to district Chancellor Laguerre and President Burns (along with other recipients). It stated that in early fall 2018, Hussain had added classes and instructors without any consultation. It stated that Altman (as a PFT union representative) had been contacted by between five and ten faculty members "with concerns about collaborative consultation, an uncivil work environment, and fear of retribution from the Dean." It also stated that Altman had witnessed "a very unfair administrative classroom observation" by Hussain for Ambalal's tenure candidacy that Altman believed was "retribution," and a meeting with English department faculty where Hussain became angry and stormed out of the room.

That same day, Metcalf-Tobin emailed a letter to recipients that included district Chancellor Laguerre and President Burns. It stated that Hussain had hired someone to teach for the arts department without any consultation. It also stated that she had a meeting with Hussain and Ambalal, where Hussain did not engage in "collegial consultation" and appeared to be recording the conversation without consent.

On March 6, 2019, Foster emailed a letter to President Burns, among other recipients. It stated that Hussain had made changes to English classes and teaching assignments without any consultation of the department co-chairs. It also stated that Hussain had cancelled two of her classes, as well as two assignments of another faculty member, in retaliation.

That same day, Merritt College's department chairs and directors had a meeting during which they "agreed to a vote of NO CONFIDENCE in Dean Syed Hussain." The result of the vote was emailed to President Burns.

J. *March 2019 Termination*

On March 13, 2019, Whittaker met with Hussain and informed him that the board had voted to terminate his contract. Whittaker gave Hussain a document titled "Notice of Termination of Employment and Paid Administrative Leave." The document stated: "This is to provide you with a 90-day written notice of the termination of your employment . . . . Your last day of employment with the district will be June 11, 2019. Effective today, (March 13, 2019) you will be on paid administrative leave from the district through June 11, 2019."

PROCEDURAL BACKGROUND

In March 2020, Hussain filed a lawsuit against the district, Morales, and Whittaker.[2] The operative complaint alleged three causes of action: (1) retaliation in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940, subd. (h)) (against the district only); (2) violation of whistleblower protection under Labor Code section 1102.5 and Education Code section 87160 (against all defendants); and (3) breach of contract (against the district only).

Defendants moved for summary judgment. The trial court granted the motion in its entirety. On the retaliation claim, the trial court determined that Hussain had made a prima facie showing and that defendants had presented "undisputed material evidence" that the district had a legitimate, non-retaliatory reason for the termination. It concluded, however, that Hussain had "failed to present evidence that creates a triable issue of fact that stated concerns about his job performance were a pretext for retaliation." The trial court concluded that this analysis "applies equally" to the whistleblower claim. On the breach of contract claim, the trial court determined that the district had the ability to terminate Hussain's employment contract and did so "consistent with the contract." Judgment was entered for defendants and the action was dismissed with prejudice. The judgment of dismissal provided for disputed issues of attorney fees and costs to be determined on subsequent motions.

In October 2021, defendants filed a memorandum of costs seeking $21,044.20 in costs as the prevailing parties. Hussain filed a motion to

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[2] Hussain amended his complaint to add Altman as a third individual defendant, but Altman was subsequently dismissed and is thus not a party to this appeal.

tax costs as to each of the three claims. In their opposition to the motion, defendants argued that the costs could be apportioned between the three causes of action. It stated that "at least" $1,410.55 of the total $16,896.08 deposition costs were based on the non-retaliation claims, identifying areas of "discrete examination topics" in the deposition transcripts. The trial court granted Hussain's motion as to the retaliation and whistleblower claims, finding that the retaliation claim lacked merit but was not "frivolous" to trigger the award of costs under FEHA, and the whistleblower claim was "inextricably intertwined" with the retaliation claim. It denied Hussain's motion as to the breach of contract claim, however, finding that the "contract issues were discrete." The trial court stated: "At hearing, parties stipulated that the costs at issue are $21,134.20." It concluded it would "exercise[] its discretion and judgment and apportion[] 33% of the costs to the contract claim." It ordered Hussain to pay $6,974.29 in costs.

DISCUSSION

Hussain seeks reversal of the judgment by arguing that the trial court erred in granting summary judgment because he presented triable issues of material fact on his each of his three claims. He also seeks reversal of the costs order by arguing that *either* summary judgment was improperly granted (and thus defendants are not the prevailing parties entitled to costs) *or* the trial court abused its discretion in apportioning one-third of the costs to his breach of contract claim. We address each argument in turn.

1. Summary Judgment

Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is properly granted when there is no triable issue of

material fact and the moving party is entitled to judgment as a matter of law. Defendants moving for summary judgment have the initial burden of showing a cause of action lacks merit because one or more of its elements cannot be established or it is subject to an affirmative defense. (*Id.*, subds. (p)(2), (o)(1); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) Once defendants meet this burden, the burden shifts to the plaintiff to show the existence of a triable issue of material fact. (Code Civ. Proc. § 437c, subd. (o); *Aguilar*, *supra*, 25 Cal.4th at p. 850.)

On appeal, we review orders granting a summary judgment motion de novo. (*Aguilar*, *supra*, 25 Cal.4th at p. 860.) "We exercise 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' " (*Lockhart v. County of Los Angeles* (2007) 155 Cal.App.4th 289, 303.) We must " 'view the evidence in the light most favorable to plaintiff[ ] as the losing part[y]' and 'liberally construe plaintiff['s] evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff['s] favor.' " (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96–97.) With this framework in mind, we turn first to Hussain's retaliation claim.

a. Retaliation Claim

Retaliation claims under FEHA are analyzed using a three-step test. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*).) First, the employee has the initial burden to establish a

prima facie case of retaliation. (*Ibid.*) If the employee does so, the burden then shifts to the employer to produce sufficient evidence that the action was taken for a legitimate, non-retaliatory reason. (*Ibid.*) If the employer produces this evidence, the burden then shifts back to the employee to demonstrate a triable issue of fact regarding whether the employer's ostensible non-retaliatory reasons for its actions were pretextual. (*Ibid.*)

i. Prima Facie Case

The prima facie case for retaliation under FEHA requires an employee to prove that: (1) he or she engaged in a "protected activity," (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1042.) On this step, a causal link may be inferred from circumstantial evidence that the employer knew of the complaints and that the protected activity occurred close in time to the adverse employment action. (*Morgan v. Regents of University of Cal.* (2000) 88 Cal.App.4th 52, 69.) Here, there is no dispute that Hussain made a prima facie showing on this claim. The evidence shows that Hussain engaged in protected activity by lodging formal discrimination complaints against Morales and Whittaker, which was known to the district, and Hussain was terminated a few months later.

ii. Legitimate Reason for Termination

We thus turn to the second step of the analysis: whether the district produced sufficient evidence that Hussain was terminated for a legitimate, non-retaliatory reason. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1042.) Hussain argues that the district failed to meet this burden

because there was no evidence of the board's reasons for his termination. Without citation to any authority, Hussain attempts to dissociate the reasons proffered for President Burns's January 2019 termination request from the board's ultimate decision, and contends there is no evidence that the board considered the subsequent complaints and no confidence vote in February and March 2019, after Burns had made her request.

We are not persuaded. On this second step, defendants bear the burden only to "introduce evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action." (*St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 509.) Here, the evidence shows that President Burns issued a request in January 2019 that Hussain be terminated based on complaints about his job performance over the prior six months, and that this request was submitted to the board for review and approval. We thus conclude that the district met its burden to present sufficient evidence of a legitimate, non-retaliatory reason for the termination.

iii. Pretext

Moving to the third step, the question becomes whether Hussain demonstrated a triable issue of material fact by producing substantial evidence that the district's stated reason for his termination—complaints regarding his inability to work collaboratively with others and other workplace behavior—was untrue or pretextual, such that a reasonable trier of fact could conclude that the employer engaged in unlawful retaliation. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1042; *DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 553.)

Hussain does not contend that his termination was based on any retaliatory motive or animus by the board or President Burns. Instead, Hussain relies on a legal principle referred to as the "cat's paw" doctrine: that employers may be responsible where retaliatory actions by other personnel "bring about adverse employment actions through the instrumentality or conduit of decision makers who may be entirely innocent of discriminatory or retaliatory animus." (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 116.) California courts have adopted this doctrine, and have accepted the legal premise that the other personnel need not have a supervisory role over the employee for the doctrine to apply. (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1536.) The cat's paw doctrine requires that the employee prove two elements: (1) the protected activity was a substantial motivating factor for the other personnel's retaliatory acts; and (2) the other personnel's improper motive was a substantial motivating factor for the decisionmaker's adverse employment action. (*Reeves*, *supra*, at p. 113; *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232; see also CACI No. 2511.)

Hussain offers two theories for application of this doctrine here. First, he contends that Morales was the cat's paw because he harbored retaliatory animus from the formal discrimination complaint, and made complaints both directly to President Burns and also indirectly by advising others to make similar complaints. What this argument overlooks, however, is that Morales had already sent complaints to President Burns on September 21 and October 4, weeks *before* Hussain filed his discrimination complaint on October 19. Morales also relayed his complaints about Hussain to Shanoski and Metcalf-Tobin before

that date. Similarly, Morales and Ambalal discussed her complaint on October 15, several days before Hussain's filing of the discrimination complaint. Given that Morales was engaged in these alleged retaliatory acts *before* Hussain's protected activity (the formal discrimination complaint), such activity could not have been a substantial motivating factor.

King v. United Parcel Service, Inc. (2007) 152 Cal.App.4th 426, 432 is instructive on this point. In *King*, an employee brought a discrimination claim alleging he was terminated because he was disabled. (*Ibid.*) The employer had presented sufficient evidence that the employee was fired because he falsified his timecard. (*Ibid.*) To show that this reason was pretextual, the employee accused the employer of an "undercover conspiracy to get rid of him" and pointed to his dispute with other employees about his hours and responsibilities. (*Id.* at p. 434.) *King* rejected this as substantial evidence of pretext, as that dispute had *preceded* the employee's disability leave. (*Ibid.*) So too here.

None of Hussain's additional arguments persuade us that the cat's paw doctrine applies to Morales. Hussain contends, for the first time in his reply brief on appeal, that the protected activity at issue was not only the formal discrimination complaint, but also the August 24, 2018 email he sent to President Burns and Whittaker about the incident with Morales. We deem this argument forfeited. (*Daneshmand v. City of San Juan Capistrano* (2021) 60 Cal.App.5th 923, 936 [forfeiture of issue by failure to raise in trial court below]; *Peninsula Guardians, Inc. v. Peninsula Health Care Dist.* (2008) 168 Cal.App.4th 75, 87, fn. 6 [forfeiture of argument raised for the first time

in reply brief on appeal].) And in any event, assuming Hussain's August 24th email was also protected activity, Hussain identifies no evidence that Morales knew about that email before complaining to President Burns about him (Morales's September 21st email does not make any such reference), so the argument still falls short of showing that Morales acted with a retaliatory motive. Hussain also contends that Morales was involved with complaints made after the formal discrimination complaint was filed, namely the February and March 2019 correspondence sent by Altman, Metcalf-Tobin, and Foster. But this contention is inconsistent with Hussain's earlier assertion—which defendants did not dispute—that there is no evidence the board relied on these later complaints in making its decision to terminate Hussain. Accordingly, we cannot conclude that this evidence showed Morales's alleged improper motive was a substantial motivating factor for the board's action.

Second, Hussain argues that Whittaker was the cat's paw in the board's decision to terminate him. He contends that Whittaker infringed on his authority as dean by directing the faculty assignment of certain classes in November 2018. He also contends that Whittaker treated him differently with regards to the confidentiality of the formal discrimination complaint, directing Hussain "not to discuss your interview, or issues related to the investigation, with any other employees in the district," but responding to Morales's question about legal restrictions on sharing the complaint by stating: "The district requests that all documents pertaining to an investigation be kept confidential, as to not impede the process or the integrity of the investigation. With that being said, the district cannot require that you

keep the documents confidential." Hussain argues that Whittaker was "essentially encouraging Morales to complain about Dr. Hussain's complaint." He also points to evidence that Whittaker opened an investigation in December 2018 for a complaint by a staff member that Hussain was "intentionally harassing me and tormenting me and traumatizing me." After another administrator stated that he didn't think the behavior was "based on sex, national origin, race, sexual orientation," Whittaker responded that she was going to open an investigation because she had "gotten too many complaints about him."

As a preliminary matter, we note that these three actions occurred *before* Hussain had filed his discrimination complaint against Whittaker. Even accepting the tenuous premise that Whittaker's actions were motivated by retaliatory intent caused by the discrimination complaint against *Morales*, we see nothing that connects these actions to the board's termination decision. There is no evidence that Whittaker's direction on faculty assignments was a substantial motivating factor in Hussain's termination. As detailed above, Morales had sent complaints to President Burns well before either formal discrimination complaint was filed, and the evidence showed that Morales's complaints related to Hussain's failure to collaborate and misrepresentations to faculty members. Nor is there any evidence that Whittaker's opening of the investigation was substantially based on retaliatory motive, and not the complaints already pending against Hussain.

Hussain argues next that he was treated differently from Morales, as he was terminated but Morales was not, despite the fact that the investigator on the formal complaint sustained allegations that

Morales conducted himself inappropriately and violated the district's civility policy during the August 24, 2018 incident, and found credible evidence that Morales's enrollment data was false and misleading. Comparative evidence, however, is only probative if it shows disparate treatment between employees who are "similarly situated." (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 366.) The evidence shows that President Burns received numerous complaints about Hussain over a six-month period, and Hussain admitted that at least six or seven faculty members had complained to him directly. It does not show that Hussain (dean) and Morales (part-time instructor) were similarly situated. Hussain also argues that he was treated differently because his formal discrimination complaint against Whittaker was delayed until after his termination. Again, there is no evidence showing disparate treatment of this complaint—an administrator testified that the district had a policy to complete investigations of a complaint within 90 days of receipt, which would have run in April 2019 after Hussain had already been terminated—or that any delay was due to Whittaker's alleged retaliatory motive.

Finally, Hussain contends that Whittaker was the cat's paw because a reasonable factfinder could conclude that Whittaker herself made the request for his termination, as President Burns "did not talk about terminating Dr. Hussain and it was left to Whittaker to address the situation." We disagree. The evidence is clear that President Burns emailed her termination request to Whittaker, who then forwarded it for review and decision by the board.

In sum, we conclude that Hussain failed to meet his burden on this third step to present substantial evidence of pretext. We thus

conclude that the trial court did not err in granting summary judgment on the retaliation claim.

b. Whistleblower Claim

Hussain argues that he presented triable issues of material fact on his whistleblower claim asserted against the district, Morales, and Whittaker under Labor Code section 1102.5 and Education Code section 87160 et seq. We begin with the Labor Code.

i. Labor Code Section 1102.5

Labor Code section 1102.5 prohibits the termination of an employee whistleblower for disclosing information where the employee "has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a local, state, or federal rule or regulation." (Lab. Code, § 1102.5, subd. (a).) Hussain contends that his formal discrimination complaints constituted protected disclosures under this provision, as he alleged Morales had threatened him and Whittaker had demanded that he hire faculty who had "defrauded" the district. We reject defendants' initial contention that this claim fails because Morales did not identify the specific statute, rule, or regulation that had been violated. Defendants cite *Carter v. Escondido Union High School Dist.* (2007) 148 Cal.App.4th 922 to support their argument, but that case concluded only that there was no section 1102.5 protection where a teacher disclosed that a coach had recommended a protein shake to a student, as that conduct does not violate any law and the teacher was not motivated by a belief that a law had been broken. (*Id.* at p. 933.) Here, Hussain presented sufficient evidence at this stage that he believed

Morales had made physical threats of harm against him, which could constitute a violation of law. (See Pen. Code, § 422.)

We thus turn to the question of whether Hussain has otherwise satisfied his burden on this claim. In *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703 (*Lawson*), the California Supreme Court explained that courts should *not* engage in the three-step analysis applicable to FEHA claims,[3] but instead "should apply the framework prescribed by statute in Labor Code section 1102.6." (*Lawson*, at pp. 707, 709.) It set forth that framework as follows: "First, it must be 'demonstrated by a preponderance of the evidence' that the employee's protected whistleblowing was a ' "contributing factor" ' to an adverse employment action." (*Id.* at p. 712.) "Then, once the employee has made that necessary threshold showing, the employer bears 'the burden of proof to demonstrate by clear and convincing evidence' that the alleged adverse employment action would have occurred 'for legitimate, independent reasons' even if the employee had not engaged in protected whistleblowing activities." (*Ibid.*)

Hussain again cites to the "cat's paw" evidence regarding Morales to argue that his formal discrimination complaints were a contributing factor to his termination, and the termination may not have occurred absent his formal discrimination complaints. For the same reasons discussed above, we do not think the evidence permits either inference.

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[3] While the trial court appears to have relied on the three-step FEHA analysis in granting summary judgment on the whistleblower claim, our review is de novo and we "need not defer to the trial court and are not bound by the reasons in its summary judgment ruling; we review the ruling of the trial court, not its rationale." (*Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1092.)

Morales had submitted his complaints and engaged with other faculty regarding their own complaints before Hussain made his alleged disclosure, and Hussain concedes there is no evidence the board relied on later complaints in its decision to terminate.

Nor are we persuaded by Hussain's argument that the "cat's paw" evidence regarding Whittaker creates a dispute about whether the termination would have otherwise occurred. Again, the evidence shows that it was President Burns (not Whittaker) who requested Hussain's termination, and there is no evidence to connect any action by Whittaker to an alternative termination outcome. We thus conclude that Hussain has failed to meet his burden under the Labor Code.[4]

ii. Education Code Section 87160 et seq.

Education Code section 87160 et seq. is known as the "Reporting by Community College Employees of Improper Governmental Activities Act." (Ed. Code, § 87160.) It similarly protects employee whistleblowers against retaliation based on a protected disclosure of improper activity. (Ed. Code, §§ 87162, subd. (e)(1), 87164.)

Hussain contends that the same burdens applicable to his claim under Labor Code section 1102.5 apply here. We agree. "Once plaintiff has shown by a 'preponderance of evidence' that a protected disclosure or activity 'was a contributing factor in the alleged retaliation,' the burden shifts to the district to show by 'clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected disclosures

[4] Given this conclusion, we need not address defendants' alternative argument that the Labor Code section 1102.5 claim against Morales and Whittaker also fails because the statute does not create personal liability for individual employees.

or refused an illegal order.' " (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 862, citing Ed. Code, § 87164, subd. (j).) We note, however, that Education Code section 87164, subdivision (i) explicitly states: "This section is not intended to prevent a public school employer, school administrator, or supervisor from taking, failing to take, directing others to take, recommending, or approving a personnel action with respect to an employee or applicant for employment with a public school employer if the public school employer, school administrator, or supervisor reasonably believes an action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (e) of Section 87162." This subdivision has been interpreted to mean that a district may satisfy its burden by demonstrating by "clear and convincing evidence that those engaging in the alleged retaliation reasonably believed their conduct was justified on the basis of evidence separate and apart from the fact that the employee made a protected disclosure." (*Mize-Kurzman v. Marin Community College Dist.*, at p. 862.)

Given the two statutory schemes require the same burdens and Hussain relies on the same evidence, we similarly conclude that he has failed to satisfy his burden under the Education Code. The conclusion applies with even greater force here in light of Education Code section 87164, subdivision (i), as defendants presented evidence showing Hussain's termination was based on the review and approval of President Burns's request, which was in turn based on her reasonable belief that such termination was justified in light of the numerous

complaints she had received about Hussain over the preceding six months from faculty, staff, and students.

In sum, we conclude that the trial court did not err in granting summary judgment on the whistleblower claim.

c. Breach of Contract Claim

Hussain argues that he presented triable issues of material fact on his breach of contract claim by attempting to dispute that (1) President Burns actually requested his termination; and (2) the district actually terminated his contract. We reject this first argument because, as detailed above, the evidence shows that President Burns emailed her termination request to Whittaker, who then forwarded it for review and decision by the board.

To support his second argument, Hussain points to "readouts" of the board's meetings to dispute whether the board actually decided to terminate him. While Whittaker declared that the board voted to terminate Hussain's employment during its March 12, 2019 closed session, the readout from that meeting does not reference this vote. The district contends that this was a "clerical oversight." Moreover, the readout from the July 23, 2019 meeting indicates that the board voted "not to re-employ" Hussain. Hussain contends that the board did not terminate him, and thus the district breached his employment contract by failing to compensate him through its specified June 30, 2020 end date.

While we acknowledge that these readouts raise a potential inconsistency in the board's internal process, we are not persuaded that they raise a triable issue of *material* fact on the breach of contract claim. "In interpreting an unambiguous contractual provision we are

bound to give effect to the plain and ordinary meaning of the language used by the parties." (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 684.) Thus, where " 'contract language is clear and explicit and does not lead to absurd results, we ascertain intent from the written terms and go no further.' " (*Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 53.)

Here, the language of the employment contract is unambiguous that the district "may terminate this Agreement at any time with or without cause, in the sole discretion of the district, upon 90 days written notice before the termination date." In short, Hussain could be terminated *upon* such notice. The district satisfied this provision by its 90-day notice of termination to Hussain on March 13, 2019. The contract did not require the district to follow any other particular process to effectuate the termination. Accordingly, we see no basis to conclude that Hussain presented a triable issue of material fact on this claim.

In sum, we conclude that the trial court did not err in granting summary judgment on the breach of contract claim.

2. Costs Order

Hussain challenges the costs order on three bases. First, Hussain argues that the costs order must be reversed if summary judgment is reversed. Given our conclusion that there was no error in granting summary judgment, we reject this argument.

Second, Hussain argues that the costs order should be reversed because his breach of contract claim was inextricably intertwined with his FEHA retaliation claim. Civil Code section 1032 provides the general rule that a "prevailing party"—defined to include defendants in

whose favor a dismissal is entered—is entitled to recover costs "[e]xcept as otherwise expressly provided by statute." (Code Civ. Proc., §§ 1032, subds. (a)(4), (c).) FEHA claims are one such exception. (*Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 99–100.) "[A]n unsuccessful FEHA plaintiff should not be ordered to pay the defendant's fees or costs unless the plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit." (*Ibid.*) Here, the trial court concluded that Hussain's FEHA claim was not frivolous, and thus costs could not be awarded for that claim.

The FEHA exception also applies "to any other cause of action that is intertwined and inseparable with the FEHA claims." (*Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1062, fn. 20 (*Roman*).) As *Roman* explained, this protection makes sense because the inclusion of intertwined and inseparable theories of liability does not increase overall costs and advances the "clear legislative goal of encouraging potentially meritorious FEHA suits." (*Ibid.*) Here, the trial court agreed that Hussain's whistleblower claim was "inextricably intertwined" with the FEHA retaliation claim. It concluded, however, that the breach of contract claim was "discrete" and thus awarded costs on this claim.

The trial court did not abuse its discretion in reaching that conclusion. On the FEHA claim, Hussain attempted to show that Morales and Whittaker took various retaliatory actions based on his filing of the formal discrimination complaints, and that those actions resulted in his termination. On the breach of contract claim, Hussain attempted to show that the district had not actually terminated him

and thus it had breached his employment contract by failing to pay him through the original end date of the contract. The contract claim was thus not based on the "same alleged misconduct" as the FEHA claim, and involved the litigation of unique issues related to the written language of Hussain's employment contract and the district's decision process for his termination. (*Roman*, *supra*, 237 Cal.App.4th at p. 1060.)

Third, Hussain argues that even if his breach of contract claim was not inextricably intertwined with his FEHA claim, the award should nonetheless be reduced. We reject Hussain's initial contention that the award should be reduced because defendants "conceded" that only $1,410.55 of the $16,896.08 deposition costs (less than 33%) were based on his non-retaliation claims. Defendants identified areas of discrete examination topics in the deposition transcripts unrelated to Hussain's FEHA claims to argue that they were entitled to "at least" $1,410.55 of those costs. But rather than analyze the deposition transcripts granularly, the trial court instead exercised its discretion to apportion 33% of the total costs. We see no basis to conclude that this apportionment was an abuse of discretion. (See *Lin v. Jeng* (2012) 203 Cal.App.4th 1008, 1023 [trial court properly determined that one-third owner should bear one-third of costs].)

We agree, however, with Hussain's other arguments for reduction of the award. He argues, and defendants concede, that the $400 expert fees should not have been included in the total costs for apportionment because they pertained only to the FEHA claim. The parties also agree that defendants' memorandum sought $21,044.20 in total costs, $90

less than the trial court indicated in its order.[5] Accordingly, we conclude that the costs order should be modified to award defendants $6,812.59 in costs (33 percent of the new $20,644.20 total after excluding $400 expert fees).

DISPOSITION

The February 15, 2022 costs order is modified to reduce the award of costs to defendants to $6,812.59. The October 26, 2021 judgment and February 15, 2022 costs order are otherwise affirmed. The parties shall bear their own costs on appeal.

GOLDMAN, J.

WE CONCUR:

STREETER, Acting P. J.
BROWN, J.

[5] Hussain represents that the trial court "erroneously stated" that the parties had stipulated at the hearing to the $21,134.20 total amount. Given that the parties already agree the award should be modified to remove the expert costs, we conclude that the modification should also include this correction.